

1 Richard M. Stephens
2 STEPHENS & KLINGE LLP
3 10900 NE 4TH Street, Suite 2300
4 Bellevue, WA 98004
5 425-453-6206
6
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF WASHINGTON
10 AT YAKIMA

11 ENRIQUE JEVONS, as managing
12 member of Jevons Properties LLC,
13 FREYA K. BURGSTALLER, as trustee
14 of the Freya K. Burgstaller Revocable
15 Trust, JAY GLENN and KENDRA
16 GLENN,

17 Plaintiffs,

18 vs.

19 JAY INSLEE, in his official capacity as
20 Governor of the State of Washington
21 and ROBERT FERGUSON, in his
22 official capacity of the Attorney General
23 of the State of Washington,

Defendants.

No. 1:20-cv-03182-SAB

Plaintiffs' Supplemental Reply Brief
regarding *Cedar Point Nursery*

This brief is to reply to Defendants’ Supplemental brief regarding *Cedar Point Nursery v. Hassim*, ___ U.S. ___, 141 S.Ct. 2063 (2021) (ECF 52). Defendants do not defend on the basis of any exception from the rule that mandated physical occupations are *per se* takings addressed in *Cedar Point Nursery* and in Plaintiffs’ Supplemental Brief. ECF 48, at 5-9. Rather, Defendants’ overarching themes are that government may regulate landlord-tenant relations, that Plaintiffs’ properties are open to the public and that Plaintiffs’ invited their tenants to reside in their homes.¹ These themes do not discount *Cedar Point Nursery’s* impact on Plaintiffs’ pending claim.

I

Despite the Supreme Court’s reaffirmation of the importance of the right to exclude to the entire bundle of rights that constitutes property, Defendants assert that government is free to regulate the economic relations of landlords and tenants without causing a taking. ECF 52, at 2. Defendants quote *F.C.C. v.*

¹ Defendants assert that Plaintiffs seek to “stop the now-expired Evictions Moratorium” by arguing that it is a taking for which compensation is required. ECF 52, at 1. Plaintiffs’ Fifth Amendment claim does not seek to stop anything, but to obtain a declaration that the Proclamations cause a taking of property.

1 *Florida Power Corp.*, 480 U.S. 245. 252 (1987), as stating “statutes regulating
2 the economic relations of landlords and tenants are not *per se* takings.” ECF
3 52, at 3. Additionally, they rely on *Yee v. City of Escondido*, 503 U.S. 519,
4 528-29 (1992)), for the proposition that “States have broad power to regulate
5 housing conditions in general and the landlord tenant relationship in particular
6 without paying compensation for all economic injuries such regulation
7 entails.” ECF 52, at 3. No one here demands compensation for **all** injuries.

8 But *Florida Power* and *Yee* are both cases challenging regulation of the
9 price of rent and holding that regulations of rent prices—like numerous prior
10 price control regulations—did not constitute a *per se* taking. The fact that
11 government may regulate the economic relations between landlords and tenants
12 does not answer the question as to whether a particular regulation—requiring
13 landlords to house tenants who break their leases or pay no rent with no
14 prospects of ever recovering the rent—is a *per se* taking because it is mandating
15 a physical occupation of property without compliance with conditions upon
16 which Plaintiffs’ invitation to occupy was based. Under Defendants’ theory,
17 because the state may regulate landlord-tenant relations, it could mandate that
18 Plaintiffs house their nonpaying and lease breaking tenants indefinitely.

19 It is also important to recognize that the Court in *Yee* found payment of rent
20 significant. “On the face of the regulatory scheme, neither the city nor the State
21 compels petitioners, once they have rented their property to tenants, to continue
22 doing so.” *Yee*, 503 U.S. at 527-28. The city ordinance did not require the
23 tenants’ continued occupation when there was “nonpayment of rent.” *Id.* at 524.

1 The present situation is quite different. Defendants mandate that Plaintiffs
2 continue with the physical occupation of their property by people who pay no
3 rent whatsoever. Continued physical occupation is mandated. While that result
4 may be an appropriate response to the Pandemic and the takings clause of Fifth
5 Amendment does not prohibit the taking of property, it just requires payment of
6 just compensation so that the burden of meeting this public need is shouldered
7 by the public and not just those who are providing rental housing. *See*
8 *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

9 That government may regulate landlord-tenant relations is not a free pass to
10 never have to pay compensation when mandating a physical occupation of
11 property when the right to remain has expired by the terms of the lease or by
12 violation of lease requirements. After all, government may also regulate the
13 economic relations between employers and employees, including the right to
14 unionize, which was the backdrop of *Cedar Point Nursery*. The power to
15 regulate does not immunize the government from the requirement to pay just
16 compensation when it mandates the continuation of a physical occupation.

17 II

18 **Plaintiffs' claim that their property has been taken is not eliminated on the
19 theory that their properties are open to the public.**

20 Defendant's second major point is that *Cedar Point Nursery* involves a
21 business that was not "open to the public," and suggesting that Plaintiffs'
22 properties are. ECF 52, at 4. But *Cedar Park Nursery* explains what is meant by
23 being open to the public by specifically citing *Prune Yard Shopping Center v.*
Robins, 447 U.S. 74 (1980), *cited in Cedar Park Nursery*, 141 S.Ct. at 2076. As

1 its name suggests, *Prune Yard Shopping Center*, involving a shopping center
2 that was truly open to the public. Anyone could come and go. Plaintiffs' homes
3 which they rent are not open to the public. Rather, they are private spaces
4 which tenants have the right to occupy upon meeting conditions of the lease.
5 Failure to meet the conditions of the lease means that they have no right to
6 occupy, nor do any other members of the public.

7 **III**

8 **There is no principled reason for concluding that property is not taken
9 simply because Plaintiffs' originally invited their tenants to occupy.**

10 Defendants' argument mandates that if one ever invited someone on to their
11 property, there would be no forced physical occupation of that property if the
12 owner demanded that they leave. Of course, a property owner cannot force
13 someone to leave in violation of the rights provided in a lease. But Defendants'
14 "once invited, stay forever" theory is unsupported by logic or the cases they cite.

15 **Conclusion**

16 Defendants' Proclamations appropriate Plaintiffs' property to meet a public
17 need. The taking of private property interests has occurred.

18 Respectfully submitted this 29th day of July, 2021,

19 Stephens & Klinge LLP
20 /s/ Richard M. Stephens

21 WSBA No. 21776

22 Stephens & Klinge LLP

23 10900 NE 4th Street, Suite 2300

Bellevue, WA 98004

stephens@sklegal.pro

Attorneys for Plaintiffs